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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. ~~579~~ 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

GILBERT S. PARNELL, Respondent

NO. ~~580~~ 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner

v.

FIRST NATIONAL BANK IN INDIANA, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Bank of America National Trust and Savings Association prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered October 14, 1955, reversing judgments in favor of petitioner against the respondent Gilbert S. Parnell and the respondent First National Bank in Indiana, and remanding the case to the district court with instructions to enter judgment for the respondent Bank and to grant a new trial to respondent Parnell.

OPINIONS BELOW

The opinion of the District Court (Applt's. App. 445a-447a) is unreported and is printed in Appendix B hereto, infra, p. 29. The opinion of the Court of Appeals is reported in 226 F. 2d 297. Nine additional copies of its opinion have been filed with the Clerk contemporaneously with the filing of this petition.

JURISDICTION

The judgments of the Court of Appeals were entered on October 14, 1955, and are printed in Appendix C hereto, infra, p. 32. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the rule announced in *Clearfield Trust Co. v. United States,* 318 U. S. 363, with respect to the rights of the United States on one of its checks, is to be extended to a case arising under diversity jurisdiction and involving only the rights of private parties with respect to the ownership of bonds of an instrumentality of the United States?

In other words, in a diversity case, is the question whether a private defendant converted bonds of an instrumentality of the United States, in Pennsylvania, to be governed by the law of Pennsylvania or by a "federal" law?

2. Assuming that the question of conversion of bonds of an instrumentality of the United States, as

between private parties, is to be governed by "federal" law, is the source of that federal law (with respect to such issues as burden of going forward with evidence of good faith and dealing with the bonds after maturity) to be found in old federal decisions or in the provisions of the Negotiable Instruments Law which has been enacted in every state of the Union and by Congress for the District of Columbia?

3. Where theft or defective title has been shown, does not the one who asserts the defense of bona fide purchaser have the burden of proving the defense, under both federal decisional law and the Negotiable Instruments Law of Pennsylvania?

4. May one who takes bonds of an instrumentality of the United States four and one-half years after they have been called and with notice of the call claim the rights of a holder in due course?

STATUTES INVOLVED.

The statutory provisions involved are the Rules of Decision Act, 28 U.S.C. §1652; and Section 59 of the Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P.L. 194, Pa. Stat. Ann. Tit. 56, §139 (1930). They are printed in Appendix A, infra, p. 28.

STATEMENT

This was a civil action brought by petitioner in the District Court to recover for the conversion of $57,600 principal amount of 3% Series A bearer bonds of Home Owners' Loan Corporation. The jurisdiction of the District Court was invoked on the basis of the diverse citizenship of the parties under 28 U.S.C. §1332.

The bonds here involved were part of a larger group of Home Owners' Loan bonds which had been purchased by petitioner and which were stolen by sneak thieves in May, 1944 (Applt.'s App. 32a-92a) while they were being prepared by petitioner's clerk for transmission for payment. Notice of the loss or theft of the bonds, including the serial numbers of the bonds, was disseminated promptly throughout the United States (Applt.'s App. 93a-114a).

In September of 1948 the defendant Rocco turned over to the defendant-respondent Parnell, who was a lawyer, $25,000 of stolen West Penn Power Company and United States Treasury bonds (Appellee's App. 13b-21b). Parnell took them to the defendant-respondent First National Bank in Indiana, and the bank, acting through its cashier, disposed of them and gave Parnell a check, which he immediately endorsed and surrendered for currency (Appellee's App. 13b-15b, 25b-26b; Applt.'s App. 313a-314a, 348a-349a).

Eighteen days after this transaction, Parnell brought into the defendant bank $19,600 of the Home Owners' Loan bonds here in suit, and twenty-seven days later brought in the remaining $38,000 of bonds, all of which he had received from Rocco (Applt.'s App. 13a-14a, 303a-306a). These bonds had been called for pay-

ment in 1944 (Applt.'s App. 64a) and eight overdue coupons, representing four years' interest, were attached to each bond (Applt.'s App. 175a). In each instance Parnell dealt with the cashier, the same man as before, who knew that the Home Owners' Loan bonds had been called for redemption as of a date almost four and a half years earlier (Appellee's App. 14b-15b; Applt.'s App. 313a-314a, 343a).

The defendant bank sent the first group of Home Owners' Loan bonds to the Federal Reserve Bank branch in Pittsburgh for redemption (Applt.'s App. 153a, 171a, 334a-337a). The cashier telephoned Parnell when a credit advice was received from Pittsburgh, and Parnell thereupon went to the bank and received a cashier's check, which he immediately cashed at the bank, taking the proceeds in currency in bills of $100 and smaller (Applt.'s App. 316a-319a, 344a). Parnell took the currency to his office, telephoned Rocco that it was there, and paid him in currency. No receipts were given for the bonds; in fact, there were no receipts, correspondence, checks or writings given or received by Parnell except cashier's checks, which he cashed immediately on receipt (Applt.'s App. 311a-313a).

The $38,000 of bonds involved in the last transaction were handled in the same way, Parnell dealing with the same cashier and turning the cashier's check into small denomination bills immediately upon its receipt (Applt.'s App. 318a, 345a).

The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The jury by its verdicts showed that this testimony was not believed. The District Judge said (Appendix B, infra, p.

30): "The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented." And Judge Goodrich added in his dissent from the opinion of the Court of Appeals (226 F. 2d 307): "The facts do not tend to show the regularity and good faith of the transaction, the 'ordinary course of business' aspect of the things the parties were doing. Furthermore, the jury saw the witnesses."

The jury returned verdicts against each of three defendants and in favor of petitioner in the amount of $57,600 (Applt.'s App. 439a), and judgments were entered thereon (Applt.'s App. 448a). The defendants Gilbert S. Parnell and First National Bank in Indiana appealed. No appeal was taken by Arthur A. Rocco, the third defendant against whom judgment was entered.

The Court of Appeals for the Third Circuit, after argument on the appeals, ordered a rehearing before the entire bench of seven judges. After this rehearing the judgments appealed from were reversed and the cause remanded upon the opinion of a majority of four members of the court holding that the questions were to be decided under federal law and that under federal law the respondents were not required to establish their defense of good faith purchasers. The court directed that judgment should be entered for the defendant First National Bank in Indiana for want of sufficient evidence of bad faith and a new trial granted the defendant Parnell because of improper instructions as to burden of proof of good faith. Three members of the court dissented in an opinion by Circuit Judge Goodrich.

REASONS FOR GRANTING THE WRITS

1. ***The decision of the Court of Appeals, that the question involved here, between private parties, is to be decided under federal decisional law, presents an important question in the operation of the Federal System established by the Constitution, and under the Rules of Decision Act***[1]. The decision presents a question of far-reaching importance in the administration of the work of the Federal courts, and of the extent to which this Court's decision in *Clearfield Trust Co. v. United States,* 318 U.S. 363 should be applied or extended.

The decision of the majority of the Court of Appeals is that the property rights of owners and transferees of Government bonds, as among themselves, are not to be determined by the statutory law of the state where all the operative events occurred, but by the decisional law of negotiable instruments developed independently by the Federal courts under the regime of *Swift v. Tyson,* 16 Pet. 1. The sole basis of decision is the court's own determination that uniformity of results is desirable in private litigation involving Government bonds. In reaching this conclusion the court gave no effect to the facts that no Congressional enactment or federal regulation was involved, that the United States was not a party, and that the nature of its rights and obligations was not in dispute. This decision, it is submitted, seriously misinterprets the basis of *Clearfield* and is in conflict with the doctrine established by the decisions of this Court in *Burns Mortgage Co. v. Fried,* 292 U.S. 487, *Erie R. Co. v. Tompkins,* 304 U.S. 64,

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[1] 28 U.S.C. § 1652.

Guaranty Trust Co. v. York, 326 U.S. 99, and *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530.

(a) *The essential basis of Clearfield.* It is submitted that the essential basis of *Clearfield* is the fact that the right or cause of action there asserted was not a state-created right. The Government had issued a check which had been endorsed and collected by the defendant on a forged endorsement. The law which authorized the issuance and payment of the check was the statutory law of the United States. *Its* right to recover was dependent on the legal consequences to be attributed to the transaction in which *it* had engaged. Since the right to do the acts was dependent solely on federal law, this Court held that the consequences of the acts were to be determined by the same law. The application of state law would permit the states to limit and condition the legal rights of the United States, and make its rights dependent on the will of the states, a situation objectionable under our dual system of government.

In the present case the question arises between private parties with respect to the ownership of property dealt with in Pennsylvania. The substantive right asserted is created solely by the law of Pennsylvania. To apply Federal decisional law to the determination of such a right, unless the Constitution or a federal statute so directs, serves no interest of the United States, and introduces an undesirable and fruitless diversity into the law governing private transactions in negotiable paper. It is one thing to say that the rights and obligations of the United States are to be determined under its own law; it is a wholly different thing

to say that the rights and liabilities of private parties are also to be decided by federal law although the United States has not, by statute or regulation, entered or in any sense occupied or preempted the field. Such a decision extending the rule of *Clearfield Trust Co. v. United States* introduces uncertainty into the law throughout the United States until it is either confirmed or disapproved by this Court.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, Mr. Justice Frankfurter, speaking for the majority of the Court, carefully pointed out at page 109: "Here we are dealing with a right to recover derived not from the United States but from one of the States." Again, at page 112: "The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States."

The same doctrine is reaffirmed in the opinion of Mr. Justice Douglas (announced by Mr. Justice Reed) in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, at 533:

> "* * * But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law."

(b) *The decision below is in conflict with United States v. Guaranty Trust Co.*, 293 U.S. 340. That case involved a check of the United States drawn in the District of Columbia and sent by mail to Yugoslavia. It was there transferred by forged endorsement and in due course reached the Guaranty Trust Company, under fur-

ther endorsements. The Guaranty Trust Company presented it to the United States, and received payment. When the forgery was discovered, the United States sued the Guaranty Trust Company. The decision went against the United States, and it went that way on the ground of ownership of the instrument. The Court looked to the law of Yugoslavia, where the instrument was transferred under the forged endorsement. It found that under the law of Yugoslavia the transferee under a forged endorsement acquired a good title. Consequently, it held that when the Guaranty Trust Company received the check in the United States, it, too, acquired a good title, and, as owner, was entitled to keep the payment which it had received when it gave up the instrument.

The important thing to note here is that the *Guaranty Trust* case was not decided under any supposed "federal" rule. The Court held that the result in the case turned on the ownership of the instrument, as between private parties. It decided that question of ownership in accordance with the local law of the place where the transfer had occurred. That local law was different from any law in effect in the United States. Nevertheless, it was held applicable and controlling in determining the ownership of this instrument, which was a Government check.

It is true that in the *Guaranty Trust* case the check was addressed to Yugoslavia, and the Court said that "It was thereby given something of the quality of a foreign bill; * * *." 293 U.S. at 346. What this apparently means is that the United States sent the check into Yugoslavia and must therefore be deemed to have con-

sented to the application of Yugoslavian law, or at least must have understood that Yugoslavian law might be applied to questions of transfer of the check. However, in the present case, the bonds were issued in the United States, and the United States intended that they should circulate throughout the United States, in each one of which the Negotiable Instruments Law is in force. In the absence of a specially prescribed "federal" rule, it seems appropriate to say that the United States understood that these bonds would circulate in the United States in accordance with the provisions of the Negotiable Instruments Law, so far as ownership by private parties is concerned, just as it was held that the ownership of the check involved in the *Guaranty Trust* case was subject to the law of Yugoslavia when it was sent there.

The decision below is, in principle and in substance, in conflict with the basis of the decision in the *Guaranty Trust* case in determining the law applicable to the effect, as between private parties, of the transfer of a Government instrument.

Reference may also be made to the long established rule that, though a question of the validity or infringement of a patent is within federal jurisdiction, a question involving the transfer or assignment of patent rights does not present a federal matter. *Luckett v. Delpark, Inc.,* 270 U.S. 496; *Wade v. Lawder,* 165 U.S. 624; *Wilson v. Sandford,* 10 How. 99.

(c) *The constitutional and statutory obstacles to the proposed extension.* The extension of *Clearfield,* resulting from the decision below, inevitably raises the very important constitutional considerations which arise from the fact that ours is a Federal government

where the maintenance of the proper spheres of the States and of the Federal Government is fundamental. These considerations, stemming from the framework of our Constitution, are well known, and are spelled out in detail in the opinion of Mr. Justice Brandeis in the *Erie* case. We need not discuss here, however, whether the result in *Erie* turns upon a "constitutional basis" or a more limited "statutory basis." The statutory basis of *Erie* is here presented in sharp focus. The Rules of Decision Act has represented the will of Congress since 1789. This Act provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

There has been discussion as to whether or not this statute applies in non-diversity cases such as *Clearfield*.[1] It has never been doubted, however, that the statute is fully applicable where the jurisdiction of the federal court is based on diversity of citizenship. The Court of Appeals does not refer to or discuss this basic and fundamental statute. The ignoring of this command of Congress raises a question of importance in the administration of the Federal System. No basis is known for saying that this is one of the cases to which "the laws of the several states" do not apply so as to bring into effect the reservation at the close of the statute.

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[1] See *Clearfield: Clouded Field of Federal Common Law*, 53 Columbia L. Rev. 991 (1953).

The mandate of the statute is even more demanding in this case than in *Erie*. The problem here is not between the law as established by coordinate courts as it was in *Erie*, but between federal decisional law and state statutory law. In *Burns Mortgage Co. v. Fried, supra*, this Court unanimously determined that in a case involving only the rights of private parties the statutory law of a state (there, as here, the Negotiable Instruments Law) and the construction thereof by a state court of last resort could not be rejected in favor of federal decisional law, and that this was true whether the enactment was one which altered the common law or one which merely codified and declared it. In view of the decision in *Burns Mortgage Co.* it would seem more proper to refer to the decision here as an extension of *Swift v. Tyson*, 16 Pet. 1, than as an extension of *Clearfield*. Certainly, in underlying philosophy and reasoning, the decision here is more a brother of *Swift v. Tyson* than of *Clearfield*. If the decision below is sound, then surely "the ghost of Swift v. Tyson, supra, still walks abroad." *Sampson v. Channell*, 110 F. 2d 754, 761 (C.C.A. 1st, 1940).

(d) *The remote interest of the United States.* The decision of the Court of Appeals is predicated upon three assumptions, viz.: (i) that the United States has an interest (undefined) in the outcome of litigation between holders of Government bonds; (ii) that in order to protect this interest, there must be uniformity in the determination of the rights of owners as against transferees of such bonds; and (iii) that such uniformity will be attained if these rights are determined by federal decisional law rather than state statutory law. It is

submitted that all three assumptions are unsound, and that the decision introduces uncertainty and confusion which may actually work against the interest of the United States.

If the United States has in fact any substantial interest in the outcome of litigation between private parties who deal in its bonds, the proper and effective way to achieve uniformity of result would be to state the rule deemed proper in a statute or appropriate regulation. This has not been done. The only statute[1] here involved authorizes the issuance of the bonds and is completely silent as to the rights of owners and transferees, except that it is provided that the bonds are to be free of certain taxes. The United States Treasury Department Regulations[2] are equally silent so far as the rights of owners and transferees are concerned. These regulations set forth in considerable detail the procedures followed by the Treasury Department in making payments on the public debt and are very careful to point out that the Treasury Department cannot undertake to protect owners of lost or stolen coupon bonds or notes. They do not purport to touch upon the rights of owners and transferees as among themselves.

The Court of Appeals has not seen fit to spell out how the United States would benefit by having applicable to United States bonds a rule as to the rights of transferees which is contrary to the rule applicable in every state of the Union and in the District of Co-

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[1] Home Owners' Loan Act of 1933, 48 Stat. 128 (1933), 12 U.S.C. §§ 1461 et seq.

[2] Title 31, Code of Federal Regulations, Chapter II, Part 306.

lumbia with respect to the rights of transferees of other bonds. The absence of any provision in the statute authorizing the issuance of the bonds and in Treasury Department regulations suggests rather strongly that the rights of owners and transferees as among themselves are of no vital concern to the United States. This is not surprising. We find it difficult to believe that the salability of Government securities will be substantially affected one way or another by the determination of disputes among owners and transferees. Assuming, however, that the United States does have some interest in such disputes, we submit that investors are more likely to be deterred from investing in, than encouraged to invest in, Government bonds by rules of law which make it easier for a thief to dispose of a Government bond than bonds of private corporations.

The assumption that a better uniformity of result will be achieved by applying federal decisional law rather than a uniform law adopted in all forty-eight states and the District of Columbia seems equally unsound. Uniformity of law by the decisional process is slow and costly. It is also illusory, unless this Court can be expected to have opportunities for, and to devote its time to, the development of a law of negotiable instruments separate and apart from that contained in the Negotiable Instruments Law. Uniformity by the application of federal decisional law is predicated on the hypothesis that the right of review by this Court provides a full and complete mechanism for reconciling conflicting opinions. The pressure of business on this Court understandably makes review here the exception rather than the rule and, as Judge Augustus Hand has pointed out in *Cole v. Pennsylvania R. Co.*, 43 F. 2d 953, 957

(C.C.A. 2d, 1930): "Consequently there is much less chance than formerly of securing or even promoting uniformity through the decisions of the Supreme Court."

An interesting analogy to the case at bar was presented at the last term of this Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U. S. 310. The action was on a policy of marine insurance on a houseboat used for commercial carriage of passengers on an artificial lake between Texas and Oklahoma. The insurer defended on the ground of breaches of warranty against use of the boat for commercial purposes without its consent. It was claimed that the policy had been delivered in Texas, under whose statutes a breach of warranty could not constitute a defense unless the breach had contributed to bring about the destruction of the property. The District Court made no finding as to whether the policy had been delivered in Texas but held that, since it was a maritime contract, federal admiralty law, and not state law, governed. The Court of Appeals affirmed a judgment for the defendant. This Court reversed the judgment and remanded the cause to the District Court for trial under appropriate state law. Mr. Justice Black, delivering the opinion of the Court, said at page 319:

> "The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress

> could replace the presently functioning state regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come."

How long, "on a case-by-case basis," would it take the federal courts to fashion a law of negotiable instruments distinct from the states' statutory law?

In considering the soundness of the decision here, one may properly contrast the "attractive vision of a uniform body of federal law"[1] with these very practical considerations: The whole development of the law of negotiable instruments in this country has been dominated in the past fifty years by the provisions of the Negotiable Instruments Law. The Act has been interpreted and applied in literally thousands of decisions by both state and federal courts. There have been some conflicting interpretations, but these are relatively minor as measured by the degree of uniformity which has been achieved. Federal decisional law independent of the statute has been relatively meager, if not altogether lacking, for the past fifty years. It is interesting to note, for example, that the cases principally relied upon by the majority (*Murray v. Lardner,* 2 Wall. 110, and *Morgan v. United States,* 113 U.S. 476) were decided in 1864 and 1885, respectively. The number and variety of transactions taking place daily in Government securities are very large. Whether these transactions consist of pledges, assignments, gifts or other dispositions,

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[1] *Guaranty Trust Co. v. York,* at page 103.

the rights of the parties in all these transactions are now to be determined by an archaic and a largely non-existent federal decisional law and without the benefit of the provisions of the N.I.L., or the judicial experience under it. The primary source of reference for judges and lawyers called upon to advise or determine with respect to the effect of such transactions has been the Negotiable Instruments Law. The fact that the statute and the decisions under it may no longer be relied upon will come as a surprise, we think, to most lawyers and courts and do more to create uncertainty than to remove it.

2. *If the question here involved is to be decided under federal law, the question of the sources from which that law is to be drawn is one of great importance and has been wrongly decided by the court below.*

The decision is, in its approach and reasoning, contrary to this Court's decision in *Funk v. United States,* 290 U. S. 371. That case involved the question whether the wife of the defendant in a criminal case in a federal court was a competent witness in his behalf. Under the rules then applicable, that question was a matter of "common law." This Court had at least twice, and fairly recently, decided that a wife was not a competent witness. *Hendrix v. United States,* 219 U. S. 79, and *Jin Fuey Moy v. United States,* 254 U. S. 189. On the basis of these decisions, the trial court had excluded the defendant's wife as a witness, and this was affirmed by the Court of Appeals for the Fourth Circuit. When the case came here, however, the decision was reversed. The Court pointed out that legislation generally had removed

the disqualification of the wife to testify in the states. In reaching this result, the Court referred to *Benson v. United States,* 146 U. S. 325, and *Rosen v. United States,* 245 U. S. 467, in both of which cases it was held that a codefendant was a competent witness. In the *Funk* case, the Court said that the conclusion in the *Rosen* and *Benson* cases "was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative." 290 U. S. at 380. The Court then went on to say that where Congress did not exercise its power, it was the duty of the Court "to decide" the question "in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past." 290 U. S. at 382. The Court then held that because of the widespread statutory change the old rule was now out of date, and a more modern rule should be recognized, namely that a wife is a competent witness. The *Hendrix* and the *Jin Fuey Moy* cases were both expressly overruled.

The applicability of the *Funk* case to the problem involved here is clear. On the question of burden of proof the Court of Appeals relied on a decision of this Court in 1864. Since that time, the Negotiable Instruments Law has been written, and has been adopted by

every state in the Union, and by Congress for the District of Columbia. Thus, the old rule exemplified by *Murray v. Lardner,* 2 Wall. 110, if correctly interpreted by the court below, is now completely outdated and should no longer be regarded as stating the rule applicable in the federal courts.[1] The parallel between the two situations seems very close. As a matter of fact, the present situation is much stronger than that involved in the *Funk* case, since the cases overruled in the *Funk* case were much more recent, and since the statutory provisions relied on as changing the common law in the *Funk* case were varied, while here the common law of the country, as between private parties, has been restated by the adoption of the Negotiable Instruments Law by every state, and by Congress for the District of Columbia.

There are other cases which support the conclusion that even though the matter is governed by "federal" law, the source of this law should be found in the Negotiable Instruments Law. Reference may be made to *Burns Mortgage Co. v. Fried,* 292 U. S. 487. That case was a diversity case. It was decided in 1934, while *Swift v. Tyson* was still operative, before the decision in *Erie Railroad Co. v. Tompkins.* The case involved a negotiable instrument. Thus, it raised a question of commercial law, and under *Swift v. Tyson* this question was to be decided in accordance with the "federal common law." The Court, speaking through Mr. Justice Roberts, held that the question should be decided under

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[1] As we contend under point 3, *infra,* page 23, the correct interpretation of the *Lardner* case is that it does not conflict with §59 of the N.I.L.

the Negotiable Instruments Law as interpreted and applied by the Florida court. Thus, for this purpose, the decision of the Court amounted to a decision that the "federal common law" in this field was determined by the state law of Florida embodied in the Florida statute and the decision of the Florida Supreme Court.

Other cases presenting a similar approach include *Mutual Life Insurance Co. v. Johnson,* 293 U. S. 335, 340; *Marine National Exchange Bank v. Kalt-Zimmers Manufacturing Co.,* 293 U. S. 357, 366-367; and *Board of County Commissioners v. United States,* 308 U. S. 343, 351-352.

With respect to the source of federal law on such a matter as that here involved, the decision below appears to be in conflict with *New York, N. H. & H. R. Co. v. Reconstruction Finance Corporation,* 180 F.2d 241 (C.C.A. 2d, 1950). That case arose in connection with the reorganization of the New Haven Railroad under Section 77 of the Bankruptcy Act. The question was whether a renunciation of interest was valid. The Reconstruction Finance Corporation contended that the question must be decided in accordance with "federal common law," and not under Section 122 of the Negotiable Instruments Law as enacted in New York. With respect to this contention, the court, speaking through Judge Learned Hand, said (180 F.2d at 244):

> "The purpose of the doctrine that the transactions of such corporations are not subject to state law, is that such agencies, being national in their scope and aim, shall not be forced to shape their transactions to conform to the vary-

ing laws of the places where they occur, or are to be carried out. Uniformity is thought to be essential to the convenient and speedy dispatch of their operations. However, the Negotiable Instruments Law has been enacted in every state of the Union, as well as in the District of Columbia; it is a source of 'federal law'—however that phrase may be construed—more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of Swift v. Tyson. So far as it applies to the letter of December 21, 1938, it will therefore determine the rights of the respondent and the liabilities of the present petitioner, for it is New York law as well as 'federal law.' "

See also, to similar effect, *Whitin Machine Works v. United States*, 175 F.2d 504, 507 (C.C.A. 1st, 1949).

One of the serious consequences of the decision in this case is that the dead hand of decisional law developed almost a century ago is perpetuated and placed beyond the power of the states to alter or change, either by judicial decision or statutory enactment. If Pennsylvania is to be no longer free to legislate with respect to such matters as the morals of the market place, federal rules established at such an early date should not be accepted without critical appraisal of the soundness of the rules in relation to present day conditions. The words of Mr. Justice Black in the dissenting opinion in *Francis v. Southern Pacific Co.*, 333

U.S. 445, at pages 452-453, are peculiarly appropriate here:

> "* * * The old Adams rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments. * * *
>
> I.
>
> It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment."

3. *The decision of the Court of Appeals that the defendant-respondents were not required to prove their asserted defense of being purchasers in due course is directly in conflict with the decision of the Court of Appeals for the Sixth Circuit in Kean v. National City Bank, 294 Fed. 214 (1923), cert. den. 263 U.S. 729, the*

decision of the Court of Appeals for the Seventh Circuit in C. F. Childs & Co. v. Harris Trust & Savings Bank, 27 F. 2d 633 (1928), cert. den. 278 U.S. 653, and the decision of the Court of Appeals for the Tenth Circuit in Queenan v. Mays, 90 F. 2d 525 (1937), cert. den. 302 U.S. 724. Each of these cases involved the alleged conversion of United States bonds, and in each it was held that the burden of proving the defense of bona fide purchaser rested upon the party asserting the defense.

In the *Kean* case the court, speaking without reference to state law, said (294 Fed. at 226):

> "As an aid in retrial, it remains only to say that in our opinion the defense of bona fide purchaser is an affirmative defense, and the burden of proving it rests with the defendant. Curtis, Collins & Holbrook Co. v. United States, supra; Wright-Blodgett Co. v. United States, 236 U.S. 397."

The *Childs* case and the *Queenan* case refer to state statutory law, and presumably were applying such law rather than any independent federal decisional law. This does not lessen the conflict with the decision here, however, since United States bonds were involved and the result here would have precluded the use of state statutory law.

Murray v. Lardner, 2 Wall. 110, upon which the majority relies, does not in fact hold anything contrary to the rule announced in the *Kean* case or the *Childs* and *Queenan* cases. The sole point for decision in the *Lardner* case was the correctness of a charge to the effect that the jury might find that the defendants had acted

in bad faith if they had reason to be suspicious of the title of the person presenting the bonds. This was held to be erroneous and would be erroneous under the express provisions of the Negotiable Instruments Law. The language upon which the majority relies represents only a general statement of the rule which is established by the first sentence of Section 59 of the Negotiable Instruments Law that every holder is "deemed prima facie, to be a holder in due course;". The *Lardner* case seems not to have been accepted in the courts as authority for the proposition that defendants are relieved of the burden of establishing all elements of holding in due course when prior defect of title has been shown by evidence of theft or other circumstances. This is clearly evidenced by the opinion in the *Kean* case, where the *Lardner* case is cited immediately preceding the language quoted above as to the burden of proof. It is indicated also by the words of this Court in *Commissioners of Marion County v. Clark,* 94 U.S. 278, at page 285:

> "Holders of such instruments, under such circumstances, are not obliged to show that they paid value for the instrument *until the other party has clearly proved* that the consideration was illegal, or that it was fraudulent in its inception, or *that it has been lost or stolen* before it came to the possession of the holder. *Wheeler v. Guild,* 20 Pick., 551; *Collins v. Martin,* 1 Bos. & P., 648; *Miller v. Race,* 1 Burr., 452; *Peacock v. Rhodes,* 2 Doug., 632." (Italics supplied.)

Applicable general principles indicate also that one who asserts that he is a holder in due course should have

the burden of proving the defense. The defense is an affirmative one and, what is more important, the facts bearing upon the defense lie peculiarly within the knowledge of the person asserting the defense. See *Fleming v. Harrison,* 162 F. 2d 789 (C.C.A. 8th, 1947), and cases there cited.

4. *As is pointed out in the dissenting opinion, the decision below is contrary to the language of this Court in Smyth v. United States, 302 U.S. 329, which indicates that when a Government bond is called for redemption it becomes a fully matured obligation.* If this is correct, no defense was available to the defendant-respondents, who did not acquire the bonds until four and one-half years after the accelerated maturity.

It is seriously doubted that the case of *Morgan v. United States,* 113 U.S. 476, upon which the majority relies, establishes a rule contrary to what seems to have been decided in the *Smyth* case. The important difference between the *Morgan* case and the case at bar, as a matter of both practical reality and legal theory, is the great difference in the amount of time which elapsed between the call date and the transaction in the bonds. In the *Morgan* case the bonds were acquired within three months of the effective date of the call, whereas in the case at bar the acquisition was almost four and one-half years after the call. As a matter of legal principle, a period of three months might well be considered a reasonable time for the equivalent of demand paper to remain in circulation; but four and one-half years certainly may not be so regarded.

Conclusion

The fact that the court below had this case reargued before its full bench, and that it divided four to three in its decision, shows the importance and difficulty of the problem involved. That problem should be resolved by this Court in its capacity as the arbiter of the Federal System.

For these reasons this Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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December 19, 1955.

APPENDIX A

I.

28 U.S.C. §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

II.

Section 59 of the Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P. L. 194, Pa. Stat. Ann. Tit. 56, §139 (1930).

§139. Burden of proof when title is defective.

Every holder is deemed prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. (1901, May 16, P. L. 194, ch. I, art. IV. §59.)

APPENDIX B

Memorandum Opinion and Order

OPINION

WILLSON, D.J.

This case might be termed the civil aftermath of the criminal case tried by Judge Marsh in this Court and reported as *United States v. Rocco,* 99 F. Supp. 746, affirmed *per curiam* by the Court of Appeals, 193 F. 2d 1008. One phase of the litigation relating to the disappearance of bonds from plaintiff's bank was before Judge Gourley on a motion for summary judgment and is reported in *National Surety Corp. v. First National Bank in Indiana,* 106 F. Supp. 302. The verdict of the jury was in favor of plaintiff in the amount of $57,600.00 against each of the three defendants, which was the face value of the bonds. The jury did not award any interest.

Defendants Gilbert S. Parnell and the First National Bank in Indiana ("Bank in Indiana") have motions pending for judgment N.O.V. and for a new trial. Defendant Arthur A. Rocco filed similar motions but withdrew them at the argument. Parnell and the Bank in Indiana insist that there was insufficient evidence to go to the jury and that the burden as to good faith was on the plaintiff throughout the case. Plaintiff's evidence indicated that the bonds in question were stolen from its bank on May 2, 1944. This point was left to the jury in the charge. The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the

definition of that term in the Negotiable Instruments Act, 56 P. S. 132. At the close of plaintiff's evidence, a motion by the Federal Reserve Bank of Cleveland for a directed verdict in its favor under Rule 50(a) was granted. Plaintiff at argument indicated that it would not pursue that matter further so that under the present record the Federal Reserve Bank of Cleveland is dismissed finally from the case. The case was tried on the theory that the evidence indicated that the bonds were stolen from the plaintiff and that the defendants Parnell and the Bank in Indiana, not having paid anything of value for the bonds, were under the duty of showing that they acquired possession of the bonds innocently and in good faith and that in the trial the burden rested on them to show good faith. With respect to the trial procedure, especially in regard to the burden of proof, this Court followed the principles enunciated in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337. The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented. In the opinion of the Court substantial justice is done by the jury's verdict. The motions will be refused.

Plaintiff presented a motion to amend the judgment by adding to the $57,600.00 principal, interest at six per centum on the various amounts which made up the jury's verdict. The matter of interest was left to the jury under the charge. It was indicated to the jury that it might give interest from the date of the loss of the bonds to the date of the verdict and fix the

rate of interest. It is pointed out that the claim of plaintiff was unliquidated until the verdict. It is believed that the question of interest is discretionary and again the Court is not disposed to disturb the finding of the jury. Accordingly, the motion to amend the judgment in this respect will be refused.

ORDER.

AND NOW, this 16th day of November, 1954, it is ORDERED:

1. Motions of defendant Gilbert S. Parnell for judgment N.O.V. in his favor and for a new trial are refused; and

2. Motions of the First National Bank in Indiana for judgment N.O.V. in its favor and for a new trial are refused; and

3. Motion of plaintiff, Bank of America National Trust and Savings Association to amend the judgment to include interest at six per centum per annum on the amount of the jury's verdict is also refused.

JOSEPH P. WILLSON,
United States District Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 11,526

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

v.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA, and FEDERAL RESERVE BANK OF CLEVELAND

FIRST NATIONAL BANK IN INDIANA, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western Dstrict of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with instructions that judgment be entered for the First National Bank in Indiana.

BY THE COURT,

STALEY,
Circuit Judge.

October 14, 1955

Appendix C.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 11,536

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

v.

ARTHUR A. ROCCO, GILBERT S. PARNELL, FIRST NATIONAL BANK IN INDIANA, and FEDERAL RESERVE BANK OF CLEVELAND

GILBERT S. PARNELL, Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed with costs, and the cause remanded with instructions that a new trial be granted to Gilbert S. Parnell.

BY THE COURT,

STALEY,
Circuit Judge.

October 14, 1955.